Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

W. DAVID LEAK, M.D., AND
PAIN CONTROL CONSULTANTS, INC.

Petitioners,

against

GRANT MEDICAL CENTER; GRANT ANESTHESIA ASSOCIATES, INC.; BHAGWAN SATIANI, M.D.; JAMES HIGHLY, D.O.; SAMBIT K. BARUA, M.D.; M. FARID EDWARDS, M.D.; MICHAEL MCKAY, M.D.; CHANG KIM, M.D.; LEE K. ROH, M.D.; KAREN LOGAN, M.D.; JON T. PRESTON, M.D.; BRADLEY GETZ, M.D.; AND; PAUL ADDESSI, M.D.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY TO BRIEF IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether conflict among the Circuit Courts of Appeals over the definition of antitrust standing has resulted in improper dismissal of Petitioners' antitrust claims?

The Circuit Courts of Appeals have not uniformly applied the Supreme Court's definition of antitrust standing in *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters et al.*, 459 U.S 519, 103 S.Ct. 897, 74 L.Ed.2d. 723, (1983), resulting in a conflict of law among the circuits. Petitioners Leak and Pain Control Consultants, Inc. now request that this Court grant certiorari to the United States Court of Appeals for the Sixth Circuit to resolve the conflict, and clarify its ruling on standing in *Associated Gen. Contractors, id.*, and establish their standing to maintain their antitrust claims against Respondents.

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ARGUMENT FOR GRANTING THE WRIT

I. THE CIRCUIT COURTS OF APPEALS HAVE NOT UNIFORMLY APPLIED THE U.S. SUPREME COURT'S DEFINITION OF ANTITRUST STANDING ANNOUNCED IN *ASSOCIATED GEN. CONTRACTORS OF CALIFORNIA, INC. v. CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL.*, 459 U.S 519, (1983), RESULTING IN A CONFLICT OF LAW AMONG THE CIRCUITS AND THE CREATION OF A *PER SE* RULE AGAINST STANDING IN THE CASE *SUB JUDICE.*

Respondents argue that *Summit Health, LTD., v. Pinhas*, 500 U.S. 322 (1991) does not provide guidance in the instant case because it involved the issue of jurisdiction rather than standing under the antitrust laws. Petitioners disagree. In *Summit Healt,id.,* this Court held that exclusion of a single opthamologist from a relevant market constituted sufficient nexus with interstate commerce to support federal antitrust jurisdiction pursuant to Section 1 of the Sherman Act. The Court found erroneous the contention advanced by the petitioners that a boycott of a single physician could have no effect on interstate commerce and thus could not constitute a violation of the Sherman Act. The Court held that the issue with regard to antitrust jurisdiction is the potential anticompetitive effect of the challenged conduct. Likewise, the issue of standing involves whether the plaintiff has

suffered the type of harm that the antitrust laws are designed to prevent, i.e., the ability to compete. Therefore, both jurisdiction and standing involve inquiry into harm to competition, albeit at different levels of inquiry.

Dr. Leak and all other physicians who are not members of Grant Anesthesia Associates, Inc. (GAA) are completely excluded from competing within a submarket of the patient population. The instant case focuses upon the harm to competition within this submarket. The District Court and the Court of Appeals' presumption that a physician with privileges at another hospital is automatically able to "fully compete" reflects a misapplication of this Court's precedent.

As elaborated in Petitioners' Petition for A Writ of Certiorari, the Circuit Courts of Appeals have taken the factors announced in *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters et al.*, 459 US 519 (1983) and interpreted them to require an antitrust plaintiff to pass various tests in order to demonstrate antitrust standing. With each Circuit employing these factors in different ways to test whether an antitrust plaintiff possesses standing, there is a legitimate issue whether such differences accurately reflect this Court's holding in *Associated Gen. Contractors*, *id.*, and whether such differences provide guidance to potential plaintiffs who may have antitrust claims.

Respondents' Motion for Summary Judgment

successfully urged the District Court to find that Petitioners lacked standing to maintain this action on the basis of Dr. Leak's staff privileges at two other Columbus hospitals, and on the basis that patients and the government would be more efficient enforcers of the antitrust laws. In making its finding, the Court drew an inference that because Dr. Leak has staff privileges at two other hospitals, he is fully able to compete in the Columbus area market for pain-related services. The Court then concluded, on the basis of its inference, that Petitioners had not suffered the kind of injury the antitrust laws were designed to prevent. The Court of Appeals affirmed.

The District Court's inference that Petitioners are able to fully compete for pain related medical services rests upon the presumption that a physician who has privileges at one hospital is able to treat the same patients at a different hospital. If this were simply a case of denial of privileges or of an exclusive contract where the affected physician was able to treat the same patients at another hospital, standing might be a legitimate issue. However, under the facts of this case, as plead and supported by the record, this is not the situation.

Respondents' statements with respect to the fact that some managed care insurance companies have designated as providers the hospitals at which Dr. Leak has privileges, is equally irrelevant for the same reason. It is the actions of Respondent Grant Medical Center in denying Dr. Leak staff privileges and the action of Respondents Grant Medical

Center and GAA in entering into an exclusive contract, that have foreclosed Petitioners from being able to provide services to such patients.

In *Jefferson Parish Hosp. Dist. No. 2 et al. v. Hyde*, 466 U.S. 2 (1984), this Court held that an exclusive contract for anesthesiological services would constitute an illegal tying arrangement if patients were forced to purchase the contracting firm's services as a result of the hospital's market power. In *Jefferson Parish, id.*, the Court specifically noted that there was no evidence that patients were unable to go to another hospital that would provide them with their choice of physician.

Petitioners, have suffered antitrust injury because they have been foreclosed as a result of Respondents' actions from being able to compete in providing in-hospital consultations and treatment related to the practice of pain medicine to a significant segment of the Columbus, Ohio patient population. This segment of the population is composed of those patients who, due to their managed care insurance plans, are limited to using either Grant Medical Center or another hospital other than the two hospitals where Dr. Leak has privileges. This segment of the patient population is a discrete sub-market due to the lack of choice that they have to choose one hospital over another. *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962).

In real practical terms, the two hospitals where Dr. Leak

has privileges are not alternatives for these patients. Therefore, they are not part of the market served by the two hospitals where Dr. Leak has privileges. This is exactly why Dr. Leak seeks to compete in an additional and different market. If these patients were able to freely choose between hospitals, there would be no anticompetitive effect from excluding Dr. Leak from providing services to these patients at Grant Medical Center.

This is the antitrust theory that Petitioners plead and pursued in this action. However, the lower courts' presumption that privileges at another area hospital means that a physician is able to fully compete and, therefore, has not suffered "antitrust injury," creates in effect a *per se* rule on standing, which is contrary to this Court's holdings.

For the above reasons, Petitioners respectfully request that this Court grant certiorari to review the judgment of the Sixth Circuit Court of Appeals.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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